IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 508

THE FLYING TIGER LINE INC., *Petitioner,*

v.

CHARLES S. MURPHY, ET AL., as individuals and as members of the CIVIL AERONAUTICS BOARD, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

1. Respondents' Brief in Opposition highlights the question of law underlying Petitioner's request that the writ of certiorari be granted. That question, which largely controls the validity of all that the Civil Aeronautics Board has done with its charter regulations ("Part 207"), is whether Section 401(e)(6) of the Federal Aviation Act constitutes the route carriers' sole authority for charter operations or whether a separate charter authority derives from the carriers' cer-

tificates as well. Petition, pp. 12-13; Resp. Brief, pp. 6, 9.* The answer requires the resolution of important issues affecting the conduct of charter operations by the route carriers that the Petition presents (pp. 14-21) but that Respondents have refused to confront. These issues of statutory construction and judicial precedent, and of the Board's authority to withhold air carrier operating rights that Congress granted, should be conclusively settled by this Court.

2. Respondents have not only failed to contest the arguments advanced to sustain Petitioner's reading of Section 401(e)(6) as the sole source of charter authority (Petition, pp. 14-18). In their desire to minimize the significance of this proceeding for the regulation of competition in charter services between the cargo and combination carriers, they have also mistakenly confined the application and effect of Part 207 in important respects:

(a) Respondents incorrectly state (Brief, pp. 6-7) that the principal adverse impact of Part 207 is limited to the cargo carriers' civilian passenger charter operations. Indeed, Respondents frame their first Question Presented so that Part 207 would appear to embrace only "passenger charter operations" (p. 2).

Part 207, however, clearly prohibits cargo charters *as well as* passenger charters in excess of the 2%-of-revenue-miles restriction anywhere outside of each cargo carrier's so-called "area of operations." Respondents thus neglect the fact that: large areas of the world, including the important Pacific Ocean area, are not within any of the designated areas of operations

* See also Brief in Opposition for Intervenor-Respondent Trans World Airlines, p. 5.

and thus fall within the 2% restriction; Petitioner's "area of operations," the contiguous 48 states, is not a fruitful market for cargo-charters; and the Board's 2% restriction on cargo charters in effect totally destroys the capability of the cargo carriers to perform even these charters (see Petition, pp. 8, 21 and n. *).

It is evident from these considerations that this proceeding involves far more than the scope of the authority of the cargo carriers to perform civilian passenger charters, although Petitioner believes that the need to resolve this controversy alone would suffice for the writ to issue.

(b) Citing financial statistics on Petitioner's recent operations, Respondents conclude (Brief, p. 7 n. 7) that charter operations are not of major economic importance to the cargo carriers.

This conclusion is incorrect. Respondents forget that almost all of the increase in Petitioner's operating revenue during the periods cited derived from Petitioner's military charters in connection with the Vietnam War.* Respondents surely would not encourage Petitioner and the other cargo carriers to rely upon this source for the supplemental revenue that

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* For the calendar years 1964 and 1965 covered in Respondents' Brief (p. 7 n. 7), the same source (C.A.B. Air Carrier Financial Statistics) discloses that $24,415,000 and $34,889,000, respectively, represented operating revenues from military charters out of Petitioner's total operating revenues of $45,468,000 and $56,156,000 in each of those years. Of the $10,688,000 total increase in operating revenues from 1964 to 1965, $10,474,000 (or 98%) derived from the increase in military charters. Without such increased military charter revenue during 1965 resulting directly from the Vietnam War, the adverse effect of the Board's restrictions on the charter operations of Petitioner and the other all-cargo carriers might well have been clearly displayed in their financial statistics.

their scheduled cargo services demand. For many years to come, as in the past, the all-cargo carriers can look only to commercial charter operations on a world-wide basis for such badly needed additional income.

(c) Respondents would have it appear that this proceeding is of limited importance because, they assert (Brief, p. 7), only the charter operations of two combination carriers and of Petitioner were "immediately affected" by Part 207.

This statement ignores the realities of the record before the Board in the rule-making proceeding. That record amply demonstrated that the 2% restriction imposed by Part 207 on "off-route" charters would severely hamper future growth of charter operations by many combination carriers, particularly the smaller local-service companies, as well as by the all-cargo carriers (see J. A. 62-63).* Furthermore, the Board's 2% restriction will not have the same adverse impact on the larger combination carriers as it promises to have on the all-cargo carriers because the former typically have enormous scheduled service passenger revenue-miles against which they will be able to apply the 2% restriction. Finally, the record before the Board showed that Airlift International, another of the four all-cargo carriers, was "immediately affected" by the 2% restriction, as Respondents have previously acknowledged (J.A. 101 n. 26). Contrary to what Respondents urge, therefore, it would seem that a broad cross-section of the combination carriers as well as two of the

* "Tr." references at J.A. 62-63 are to the five-volume record made before the Board in the rule-making proceeding that resulted in the issuance of Part 207, a certified copy of which has been filed with this Court.

four certificated all-cargo carriers (Petitioner and Airlift) objected to the 2% restriction.

(3) Respondents misconstrue Petitioner's reliance upon *American Trucking Associations* v. *United States*, 344 U.S. 298 (1953). They cite that decision, along with others (Brief, p. 10 and n. 11), for the proposition that an "evidentiary hearing" (or an "adjudicatory proceeding") is not needed to validate a regulation of general applicability such as Part 207.

But petitioner expressly disavowed reliance on *American Trucking* or any other precedent as requiring "an evidentiary hearing for a rule-making proceeding" (Petition, p. 24). *American Trucking*, Petitioner believed, required instead that *some* information of *some* probative worth must have been adduced in the administrative agency's rule-making proceeding to sustain the reasonableness of the regulation promulgated. See Petition, pp. 22-24. Petitioner holds to that view, for on this wholly independent issue Respondents are mute.

And for good reason! There was no such information before the Board in the rule-making proceeding.* In short, Respondents would have the Court refrain from reviewing an administrative regulation of sweeping import and crushing economic impact for an important regulated industry, that was promulgated after a rule-making proceeding whose record contained not one piece of information justifying the agency's stated need for the rule—to restrain the route carriers from

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* Intervenor-Respondent Trans World Airlines states simply that the passenger charter restrictions of Part 207 are "warranted by the record" and have a "reasonable basis in law" (Brief, p. 6), but cites to nothing in the record before the Board.

unduly emphasizing charters and "thereby prejudicing their capacity to . . . provide adequate scheduled service" (Resp. Brief, p. 5 n. 6). And see J.A. 17-18.

Petitioner respectfully suggests that Respondents' reference to *American Trucking* in treating the need for an "adjudicatory proceeding" (an issue that the Court disposed of by denying certiorari in *American Airlines, et al.* v. *C.A.B.*, No. 304, this Term) masks Respondents' inability to overcome the direct application of *American Trucking* to the instant proceeding.

CONCLUSION

For the reasons set forth above and in the Petition, the writ of certiorari should issue.

Respectfully submitted,

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